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No. 06-930

Supreme Court, U.S.
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In The

Supreme Court of the United States

HAROON RASHID,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE QUESTION WAS PRESERVED BELOW

The Respondent's Brief first contends that the question raised by the Petition was not properly preserved below. Referring to its argument in its Motion to Vacate Stay, the Government at pages 5 and 6 of its Brief substantively confuses the position the Petitioner's stated to the Immigration Judge on the definition of a "felony" under "***18 U.S.C. § 3559(a)(5)***" with the Petitioner's position on the definition of an "***aggravated*** felony" under 18 U.S.C. § 16(b) which was used as the legal basis for deportation. *See*, *Rashid v. Gonzales*, 190 Fed.Appx. 676, 679-80, 2006 WL 2171522, *2-3 (10th Cir. 2006). The Government refers to Petitioner's trial brief wherein Petitioner notes that the one-year sentence meets the definition of "felony" under 18 U.S.C. § 3559(a)(5). Petitioner was merely responding to the Government's contention that the crime was technically a felony under that statute - but not necessarily under 18 U.S.C. § 16(b).

There is no concession there or anywhere in the prior proceedings that the definition of a "felony" under 18 U.S.C. § 3559(a)(5) is the equivalent of an "aggravated felony" under 18

U.S.C. § 16(b). To the contrary, following the acknowledgement that the possible one-year sentence met the definition under Section 3559(a)(5), Petitioner argued to the Immigration Judge as follows:

> In United States v. Lucio-Lucio, 347 F.3d 1202 (10th Cir. 2003), the Tenth Circuit noted that 16(b) was enacted as part of the Comprehensive Crime Control Act of 1984. The Senate Report on the laws explain that the crimes of violence are meant to include "essentially the same ***categories of offenses*** described in the District of Columbia Code." The reference to the D.C. Code provisions defined crimes of violence did not include the offense of simple assault.

See, Motion to Vacate, App. A, 3 (emphasis supplied). The identical argument was made by Petitioner before the Board of Immigration Appeals. *See*, Motion to Vacate, App. C, 3-4.

In other words, Petitioner argued below that the offense of simple assault was "*categorically*" excluded from the definition of an "aggravated felony" under section 16(b). That is the very same issue raised here by Petitioner by this Petition for Writ of Certiorari.

The Government also asserts at pages 4-5 and 7 of its Brief that this question was not preserved in the Tenth Circuit appeal, referring to a footnote in that decision:

> FN2. Pursuant to the [state] statute, this crime is a class 1 misdemeanor, but **because Mr. Rashid was sentenced to 401 days' incarceration**, ...the BIA characterized the conviction as a felony under

> federal law. Mr. Rashid does not challenge this ruling.

Rashid v. Gonzales, 190 Fed.Appx. 676, 678 n.2, 2006 WL 2171522, **2, n. 2 (emphasis supplied). There, the Circuit Court is again referring to the BIA's use of the definition of a "felony" under 18 U.S.C. § 3559(a)(5), defined merely in terms of the maximum potential sentence of more than 1 year. The footnote is ***not*** referring to the definition of "aggravated felony" in 18 U.S.C. § 16(b).

The section 16(b) issue has not been waived and is *a priori* subsumed in the decision of the Court of Appeals when it specifically held that the simple misdemeanor assault fell within the definition of 18 U.S.C. § 16(b) and was an "aggravated felony" and a deportable offense. *Rashid*, 2006 WL 2171522 at **2 and **3.

II. RESPONDENT MISSTATES THE QUESTION BEFORE THE COURT

The Government misstates the question before this Court as: "whether an offense is a 'felony' under [18 U.S.C. 16(b)] if, although it is punishable more than one year of imprisonment, is classified as a 'misdemeanor' under state law." Respondent's Brief, page I. That is ***not*** the question before the Court. Rather, the Question presented by the Petition is whether a state misdemeanor

offense is "an '***aggravated felony***' for the purposes of deportation under Section 237(a)(2)(iii) of the Immigration and Naturalization Act, 8 U.S.C. § 1227(a)(2)(A)(iii)." Petition, page i.

The crucial difference in the way the Question is phrased by the each party is that Section 1227(a)(2)(A)(iii), does not refer to the general federal definition of a "felony" found at 18 U.S.C. § 3559(a)(5), but instead gives its own definition of an "aggravated felony" at 8 U.S.C. § 1101(a)(43)(F). There, an "aggravated felony" is defined as "***a crime of violence*** (as defined in section 16 of Title 18 ...) for which the term of imprisonment is ***at least one year*** ...." (emphasis supplied). The definition of an "aggravated felony" under Section 1101(a)(43)(F) has two requirements: (1) it must be defined as a crime of violence under 18 U.S.C. § 16; and (2) it must have a term of imprisonment of at least one year.

An "aggravated felony" under Section 1101(a)(43)(F) is not the equivalent of a "felony" under Section 3559(a)(5). An offense is by definition *not* an aggravated felony if it is not a "crime of violence," even if it has a term of imprisonment of at least one year. The issue here, then, is not whether the state misdemeanor is a "felony" under the general federal felony definition, as the

Government would have it, but whether the offense is a "crime of violence" as defined by 18 U.S.C. § 16. Or, more narrowly, whether the offense is a "crime of violence" under subsection (b).

III. SECTION 16(b) EXCLUDES MISDEMEANORS

The majority of the Government's argument in response to the Petition is an attempt to isolate the Third Circuit's decision in *Francis v. Reno*, 269 F.3d 162, 166-171 (3rd Cir. 2001). The irony in this effort is that *Francis* made the most in-depth and well-reasoned examination of section 16(b) misdemeanor issue, including a full look at the legislative history of the provision, by any court to date.

The Government's assertion that the Third Circuit stands alone on this question is simply not correct. The Seventh Circuit in *Flores v. Ashcroft*, 350 F.3d 666, 669 (2003), expressly held: "Because the offense of which Flores was convicted is a misdemeanor, only § 16(a) matters." Contrary to the Government's assertion, the length of sentence was not a factor in the Seventh Circuit's ruling dispensing section 16(b). *Id.* In *Singh v. Ashcroft*, 386 F.3d 1228, 1231, n. 3 (2004), the Ninth Circuit similarly ruled that an offense was excluded as an "aggravated felony" under section 16(b) because it was a state misdemeanor.

Recently, the Third Circuit in *Sing v. Gonzales*, 432 F.3d 533, 538 (2006) strongly reaffirmed the analysis in *Francis*. There, the Circuit Court noted that section 16(b) "relies on the state's grading of the offense to determine whether it is a 'felony'." *Id.* "Congress was obviously aware of the definition of 'felony' varies from jurisdiction to jurisdiction, and it could certainly have defined an 'aggravated felony' under the INA to include any state offense that would be classified as a felony under federal law. It did not do so." *Francis*, 260 F.3d at 169.

It is beyond dispute that Congress intended only the more serious felonies to fall within the definition of "aggravated felony."

> The Court also notes that the INA's legislative history casts doubt on whether Congress intended that misdemeanor simple assault offenses be encompassed in the definition of "aggravated felony." Initially, "aggravated felony" was defined as "murder, any drug trafficking crime as defined in [18 U.S.C. § 924(c)(2)], or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States." Subsequently, the definition of "aggravated felony" was expanded to refer to other felony offenses including "any crime of violence (as defined in section 16 of title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." In view of the 5-

> year minimum sentence requirement, it was axiomatic that all "crimes of violence" falling within the ambit of 8 U.S.C. § 1101(a)(43)(F) were serious felonies. …In sum, the legislative history of 8 U.S.C. § 1101(a)(43) reveals an intent by Congress to widen the range of serious offenses qualifying as aggravated felonies. That intent is highlighted by Congress' expansion of 8 U.S.C. § 1101(a)(43)(F) to include crimes of violence for which the term of imprisonment was at least one year. However, although those circuit courts of appeal which have considered the matter have concluded to the contrary, this Court is not convinced that Congress intended to expand the definition of "aggravated felony" to include the type of misdemeanor offense [*simple assault*] for which defendant was convicted.

United States v. Ponce-Casalez, 212 F.Supp.2d 42, 45-6 (D.R.I. 2002) (citations and footnotes omitted).

Similarly, as argued by the Petitioner below the legislative history of section 16(b) also discloses Congress's intent that the term "crime of violence" apply only to more serious felonies and offenses.

> Legislative history confirms that Congress meant its definition to align with the everyday meaning of the term. Section 16(b) was enacted as part of the Comprehensive Crime Control Act of 1984. That statute also included …a definition of "crime of violence" substantially identical to § 16. *See id.* sec. 203(c), § 3156(a)(4), 98 Stat. at 1985 (codified as amended at 18 U.S.C. § 3156(a)(4)). The Senate Report on the legislation explains that the crimes of violence and other serious crimes that make a hearing mandatory are meant to include "essentially the same categories of offenses described in the

> District of Columbia Code by the terms 'dangerous crime' and 'crime of violence' for which a detention hearing may be held under that statute." S.Rep. No. 98-225, at 20-21 & n. 60, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3203-04.
>
> The referenced D.C.Code provisions defined crimes of violence to include the following: murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnaping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses. D.C.Code § 23-1331(4) (1981) (most recently amended 2002). Dangerous crimes included taking property by force, certain kinds of burglary, certain kinds of arson, forcible rape, assault with intent to rape, and some drug offenses. *Id.* § 23-1331(3) (most recently amended 2001).

United States v. Lucio-Lucio, 347 F.3d 1202, 1204-5 (10th Cir. 2003) (footnote omitted). Tellingly, simple assault is not considered a "crime of violence" under the D.C.Code. *Id.*[1]

CONCLUSION

Mr. Rashid entered this country legally and has resided here

[1] The list now includes "aggravated assault" and "assault with a dangerous weapon", for example, but not simple assault. D.C.Code § 23-1331(4). It also includes "any of the *foregoing offenses* as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year," but does not include simple assault even if the offense is punishable for more than one year as it is not one of the "foregoing offenses." D.C.Code § 23-1331(4)(Q).

as a lawful permanent resident with his American wife and four American-born children for 10 years. He has been held in custody for 3 of those years while the Government has sought to deport him as an aggravated felon for a first offense state simple misdemeanor assault in which the trial court ordered only 35 days actual jail time. The offense arose out of an incident in which *he* was being harassed by a gang of youths for his ethnic dress and became involved in a fight with one of them which resulted in minor scrapes and bruises. *See*, Emergency Motion for Stay of Deportation, Attachment 5, ¶s 2 and 5 and Response to Motion to Vacate Stay, Attachment 6. There were no significant let alone serious injuries, no weapons were involved. There was nothing "aggravated" in the simple assault offense.

The Court recently noted the overreaching of the Government in extending the definition of "aggravated felony" to relatively minor offenses in deportation matters. *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). Congress intended that the extreme remedy of deportation of persons lawfully in the United States be reserved to serious offenses.

There is a clear conflict among the circuits on this issue. Not

only would justice be well served in this instance, but an important issue of law which will arise frequently in the future can be settled by the acceptance of certiorari.

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